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CASES CITED.

Supreme Court of the United States.

October Term, 1924.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *v.* THE UNITED STATES. } No. 83.

BRIEF FOR APPELLANT.

This case, being an appeal from the Court of Claims, presents in a double aspect a claim of appellant for compensation with respect to transportation done on land-aided lines of railroad. One question, the least important as regards the amount involved, is the Government's right to free transportation over some lines. The other question is the applicability of land-grant rates, viz: fifty percent of those fixed by the commercial tariffs, to transportation over those particular lines and others. With the latter of these, though on facts not identical with those which occur in this case, the court just now is familiar; a case of the Illinois Central Railroad Company, No. 248 of the October Term of 1922, on the same general question of action, having been decided on May 26, 1924.

Since there are no complications of fact, it is assumed that the argument presented below will be deemed a sufficient statement of the case.

Assignment of Errors.

Appellant says the Court of Claims erred:

1. In holding that materials transported which the

Government had the option to accept or reject at points of delivery were the property of the Government while in transit.

2. In holding that land-grant rates were applicable to the transportation of materials which the Government did not accept until after delivery at destination.

3. In holding that the legislation and adjudications by which compensation from the Government was fixed at fifty percent tariff rates for land-aided railroads did not apply to all railroads included in that description.

4. In holding that the railroads classed as "free land-grant" lines were not, under the Army Appropriation Act of June 30, 1882, (22 Stat. pp. 117, 120, 121) and the Deficiency Act of August 5, 1882 (22 Stat. pp. 257, 261), entitled to compensation from the Government at such fifty percent rates.

5. In dismissing the petition.

ARGUMENT.

This is one of three suits brought at the Court of Claims, which, beside other questions, present one question common to all. One which presents the common question, and none other, is that of the *Illinois Central Railroad Company* v. *United States*, No. 248 of the October Term of 1922, which was decided by this court adversely to the claimant on May 26 last. In the case here presented, and the case of the *Louisville and Nashville Railroad Company* v. *United States*, No. 29, that common question arises with other questions distinct from each other.

Application of Land-grant Freight Rates to Private Property.

The question presented and decided in the Illinois Central case was the applicability of land-grant freight

rates to materials, bought by the Government, at prices accruing at points of shipment, but with stipulations holding the shippers (sellers) responsible for all incidents of the transit, including demurrage for delays, unloading without injury at destinations and, in some instances, care of the property at destinations pending the physical taking of it by the Government's agents.

A somewhat comprehensive brief was filed in that case, and permission will be requested to use it in this case in connection with a few observations here to be made.

It should be understood at the outset that the terms of the contracts between the Government and the shippers (sellers) in the instant case differ from those of the Illinois Central case in regard to subject matter and to details regarding the termination of the railroad haul and places and methods of unloading of freights.

It is assumed that if there had been definite recitals in the contracts that the payment, or advancing, of the freight charges by the Government would have no effect on the properties while in transit, and that the title should remain in the shippers until delivery, inspection and rejection at the points of destination, it would be conceded that the properties while in transit belonged to the shippers and that full rates were to be paid for their transportation, by whomsoever paid? The appellant submits that the actual stipulations to which it refers in the contracts were, in their legal effect, nothing more nor less than these hypothesized recitals.

Findings of fact made by the Court of Claims, IV to IX inclusive, say that the contracts of purchase provided for inspection and sampling at destinations as preliminary to acceptance or rejection of the materials. Particular points distinctly made by one finding (VI),

relating to coal, sand and cement delivered at Minnehaha, Minnesota, for use on a lock and dam improvement, are that, in accordance with the contracts, final and exhaustive tests of coal and cement actually occurred at the site of the work, and thereupon there were rejections both of coal and of cement shipments and the contractors who furnished them were required to remove, and did remove, those consignments of materials.

If the Government's contention regarding these shipments were correct, it would be possible to point out the identical stages of the transactions at which title passed to the Government. But evidently there was no transmission of title. When the materials were moving on the cars, the relations to the parties were just what they were when the cars were loaded. When the cars reached destination, these relations were not changed; and, of course, there was no change of relations by the mere fact of the inspections and tests made. Surely it will not be contended that the materials belonged to the Government when they were condemned, on test, and the shippers removed them from the Government's premises. They were the shippers' property at this stage, and they had been the shippers' property all the time.

In the Illinois Central case the stipulations of the contracts were practically the same as those here concerned; but there was no proof of any actual rejections of the materials tendered; and it seems reasonable to assume that if this fact had been present in any of the transactions of that case the judgment would have been in the claimant's favor on those transactions.

These instances of actual rejection, in reality, help to clarify the question of title in all the shipments reviewed in the instant case. If the materials in the other instances were potentially subject to rejection at

destinations, the title was in the same state as when rejections actually were made—it remained in the shippers.

The laws do not require free service from any railroads.

The second matter presented in this case, relating to two lines of railroad and to a few transactions, is that compensation should be on the same basis as that adopted in paying for the other shipments, made on the other lines. These two are of the small class denominated in railroad and Government parlance "free land-grant" lines. By the interpretation put on the land grants at the Treasury those lines received nothing whatever, instead of fifty percent of tariff charges, for services rendered to the Government.

In most of the land-grant acts the Government's reservation was in these terms:

> "The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States." (Act of May 12, 1864, 13 Stat. 164.)

This clause was interpreted, and a long controversy in Congress and the departments settled at the Court of Claims in the Atchison Railroad Company's case, 15 Ct. Cl. 126 (following the Supreme Court's decision in that case and the case of Lake Superior & Mississippi Railroad Co. 93 U. S. 442); the decision being that the Government should have free transportation to the extent of fifty per cent of the tariff rates, as representing the roadway, but should pay fifty per cent as representing the equipment and service.

Appropriations were made year by year for fifty per

cent payments. Finally, the Army Appropriation act of June 30, 1882 (22 Stat. pp. 117, 120, 121), and a Deficiency act of August 5, 1882 (22 Stat. pp. 257, 261) contained the following:

> "For the payment for army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts, but in no case shall be more than fifty per centum of the full amount of the service to be paid, * * *"

This provision was codified in chapter 390, vol. 1 of the Supplement to the Revised Statutes (page 375), and it has been applied ever since in payments for service on railroad lines which received grants in the terms above.

There was never presented for adjudication the "free land-grant" question. The language employed in such cases, included that presented here (Act of July 4, 1866, 14 Stat. 97) is:

> "The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefits of the land grants herein made."

In the Supreme Court's opinion, by way of illustration, to make clearer the cases decided, reference is made to this latter form of grant. Obviously that reference is a mere dictum; but the accounting officer of the Government took the view that it forbade any

payment whatever over lines having such grants. But whatever may be said on this point, it can not be urged that the act of 1882 made any distinction with respect to the language of the grants.

By the Army Appropriation act of June 16, 1874, (18 Stat. 72, 74), in the case of a grant made to a railroad "on condition that such railroad should be a public highway for the use of the Government of the United States, free from toll or other charge," institution of suits in this court was authorized for whatever might be due. This provision was made permanent the next year (Ib. 453); and by the Sundry Civil act of March 3, 1879 (20 Stat. 377, 390), the Quartermaster General was authorized to make adjustments (in accordance with the decision of the Supreme Court) but not, in the absence of judgment in the individual case, to exceed fifty per cent. All of this, it will be seen, had reference to railroad grantees of the first class indicated above; but obviously the later enactment of June, 1882, codified nine years later, and constituting the permanent law of the whole subject, does not suggest any two classes of mere land-aid. It does not say "any railroad which in whole or in part was constituted by a grant of public land and on condition that such railroad should be a public highway for the use of the Government of the United States free from toll or other charge"; it says "such land-grant railroads as have not received aid in Government bonds." The only distinction is between (1) land-aided roads which had received bond aid also and (2) land-aided roads which had received no bond aid.

During the debates on these measures some sentiment was developed for making fifty per cent payment to bond-aided railroads also; but no such proposal was pressed. There never was any suggestion of admitting

to the benefit of the legislation railroads which had received both lands and bonds, and nowhere was it ever said or hinted that land-aided railroads of any class were excluded. There were in the mind of Congress three classes of railroads, viz., those which had received land aid only; those which had received bond aid only, and those which had received land aid and bond aid both. One of these classes, by mere omission, and another class, by express exclusion, were denied relief. The first class only, viz, roads which had received land aid, obtained permanent rates of partial compensation for services to be rendered.

Congress, of course, knew of the distinction made at the departments, grounded upon the phraseology of the land-granting acts, and it knew of the existing, permanent legislation of March 3, 1879, in behalf of land-aided roads of one class. It knew that "such land-grant railroads as had not received aid in Government bonds," included some railroads which, by the terms of the granting acts, were bound to transport Government property free of charge. If it had been intended to exclude these latter from the new legislation, what would have been simpler than to use the language of the act of 1879, to-wit, "a railroad * * * constructed by the aid of a grant of public land on the condition that such railroad should be 'a public highway for the use of the Government of the United States free from toll or other charge.'" Only by assuming that Congress bandied words carelessly can the legislation of 1882 be read as including only railroads of this latter description.

A part of the legislation of 1882 which especially calls for consideration is the last part-sentence, viz., "and all laws inconsistent herewith are hereby repealed." The laws, as construed by the courts, entitled

some land-aided railroads to fifty per cent pay, and, as interpreted in the departments before 1882, they denied all pay to other land-aided railroads. To legalize such payments in the former case, no repeal of existing law was necessary. In order that like compensation might be paid in the latter case it *was* logical and prudent, if not necessary, to repeal the existing law.

In the Illinois Central case the Court of Claims found that part of the claim accrued between October 30, 1911, and March 7, 1912, and this court inferred that the practice complained of there, and in this case, "had continuity for a long time." The claims will be better understood if it is recalled that long before 1911 the Comptroller of the Treasury, firstly, had upset a settlement by which land-grant rates were applied to property, obviously belonging to the shipper, carried on an ordinary bill of lading, and, secondly, that nothing was gained for the Government in such a case by the use of a Government bill of lading, the only effect of this latter being to induce a mistaken belief on the carrier's part that the title to the property was in the Government. The aim of the device with which these cases are concerned, viz: naming prices as f. o. b. points of shipment, was to evade this latter ruling.

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